

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

In Re:)
THE FINANCIAL OVERSIGHT AND)
MANAGEMENT BOARD FOR PUERTO RICO,)
as representatives of) No. 17 BK 3283-LTS
THE COMMONWEALTH OF PUERTO RICO,)
et al.,)
Debtors) Pages 1 - 79

HEARING

BEFORE THE HONORABLE JUDITH GAIL DEIN
UNITED STATES MAGISTRATE JUDGE

United States District Court
1 Courthouse Way, Courtroom 18
Boston, Massachusetts 02210
May 21, 2018
1:39 p.m.

KELLY MORTELLITE, RMR, CRR
United States District Court
1 Courthouse Way, Room 7200
Boston, Massachusetts 02210
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1 A P P E A R A N C E S:

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Russell, for GO Bondholders

3 ELIZABETH L. MCKEEN, ESQ., and ASHLEY PAVEL, ESQ.,
4 O'Melveny & Myers, for AAFAF

5 ELLEN HALSTEAD, ESQ. and ELLEN HOLLOMAN, ESQ., Cadwalader,
Wickersham & Taft, for Assured

6 TIMOTHY W. MUNGOVAN, ESQ. and GREGG MASHBERG, ESQ.,
7 Proskauer Rose, for the Financial Oversight and Management
Board for Puerto Rico (FOMB)

8 GRANT R. MAINLAND, ESQ., Milbank, Tweed, Hadle & McCloy
9 LLP, for Ambac Assurance Corp.

10 GREG HOROWITZ, ESQ. and ALICE J. BYOWITZ, Kramer Levin
11 Naftails & Frankel, for The Mutual Fund Group

12 ADAM BOOKMAN, ESQ., Weil, Gotshal & Manges, for National
Public Finance

13 JOSEPH P. DAVIS, III, ESQ., Greenberg Traurig, LLP, for
14 FOMB as Rep of PREPA and AFAAF

15 NICHOLAS BASSETT, ESQ., Paul Hastings LLP, for Interested
Party, Unsecured Creditors

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1 P R O C E E D I N G S

2 COURTROOM CLERK: The United States District Court for
3 the District of Puerto Rico is now in session on May 21, the
4 year 2018, in the matter of the Financial Oversight and
5 Management Board for Puerto Rico as representative of the
6 Commonwealth of Puerto Rico, et al. Case number 17-BK-3283.
7 The Honorable Judge Dein presiding.

8 THE COURT: Good afternoon, everyone. I'm here in
9 Boston. To the attorneys, representatives of the party, I
10 don't know if anyone of the public has made it into the
11 courthouse as opposed to outside, but welcome here, welcome in
12 Puerto Rico and welcome in New York. Hopefully we're going to
13 accomplish a lot today. That's my goal, all right? Don't make
14 me a liar first thing on a Monday.

15 So what I'd like to do today is I want to start off
16 with the motion to compel compliance with the order. And we'll
17 start off with the moving parties and then the joined parties,
18 and then we'll deal with the issues on remand, okay? Does that
19 work for everybody?

20 All right. Who is starting on the motion to compel?

21 MS. ZECCA: Good afternoon, Your Honor. Katheryn
22 Zecca on behalf of the Ad Hoc Group of GO bondholders. I'll be
23 taking the lead on the Commonwealth's motion to compel.

24 THE COURT: All right. What I'd like to do is not
25 spend a whole lot of time on dissecting the words of the order,

1 okay? I think the ultimate goal of the order was that there
2 would be a specific identification of certain documents, and
3 then the fight would center on those documents; you know,
4 should they be removed from the room; should they be
5 privileged, whatever that process is. So I think we're there.
6 I mean, I think we sort of have -- the moving parties have
7 identified a group of documents that I think are the key issues
8 right now, and let's assume that that is the documents that
9 you're seeking to have removed from the room and disclosed and
10 proceed with that.

11 MS. ZECCA: Would you like me here or at the podium?

12 THE COURT: I think it's probably easier if you go to
13 the podium just for recording purposes.

14 MS. ZECCA: Is that microphone working?

15 So I'm actually happy to report that what I was
16 originally going to talk about last was the protective order.
17 Shortly before the hearing I believe we've mostly resolved our
18 differences on that, and we'll be able to submit a stipulated
19 protective order to the court hopefully within a week.

20 What the parties have discussed, I'll just put it on
21 the record, and if I've gotten anything here wrong, other
22 co-movants or respondents will let me know. We are effectively
23 going to do the protective order that was entered in the PREPA
24 case. There's a stipulated order in connection with the motion
25 for financing that this court had a little involvement in and

1 was argued in front of Judge Swain. I think in all material
2 respects it is identical to the protective orders that each
3 side produced, but it has a Paragraph 8, which I think was the
4 one paragraph we were disputing. We are going to use Paragraph
5 8 in the PREPA order with two changes, one of which I think we
6 all agreed to. There's a sentence at the last paragraph of
7 Paragraph 8 that says, "Respondents may designate any material
8 in the data room as confidential material subject to this order
9 by written notice to the movants without the need to affix any
10 additional marking or designation."

11 As a prefatory clause to that sentence in the PREPA
12 order, we've agreed to add this language, "If any data room
13 material is made subject to this protective order, whether by
14 agreement of the parties or by court order, respondents may
15 designate," and so on. The only thing we have left to work out
16 is in the PREPA order there's no time within which --

17 THE COURT: I'm going to ask you to hold for a minute.
18 I understand that Puerto Rico cannot hear. Are they on?

19 LAW CLERK: They are on but had some issues so we need
20 to reconnect them.

21 THE COURT: Okay. We need to reconnect.

22 (Pause.)

23 I'm going to step down until this gets straightened
24 out. I apologize.

25 COURTROOM CLERK: All rise.

1 (Recess taken 1:43 p.m. - 2:02 p.m.)

2 THE COURT: All right. So now that I've given you an
3 opportunity to resolve all outstanding issues --

4 MS. ZECCA: You know, we tried. I don't know if we
5 made any progress.

6 I believe where we left off was I was explaining where
7 we are in the protective order.

8 THE COURT: Yes.

9 MS. ZECCA: I think there's one thing we have left to
10 discuss, which is in Paragraph 8, in the last sentence, it says
11 that, "Respondents may designate any material in the data room
12 as confidential material subject to this order by written
13 notice to the movants." We would like a time period upon which
14 that written notice must be given. We had proposed five days.
15 Respondents have told me that's too fast. That's fine. We can
16 negotiate.

17 We're happy to try to agree on a reasonable time
18 period, but from the movants' side we do not want it to be
19 indefinite. That's the one thing we were not able to resolve
20 in the courtroom today, but I think we're committed to try to
21 talk about it in the next few days, get something, and get the
22 court a stipulated protective order.

23 THE COURT: Okay. Why don't you do that. And then if
24 you can't resolve it, if you submit a status report with your
25 different positions, I'll probably split the difference.

1 MR. MASHBERG: Your Honor, Gregg Mashberg from
2 Proskauer Rose on behalf of the Oversight Board. Ms. Zecca
3 accurately accounted for our conversations. I just wanted to
4 add we need to go back to our client and confirm that, but I
5 think we're certainly in the right direction here, and
6 hopefully we'll have a resolution.

7 | THE COURT: Great.

8 MS. ZECCA: Okay. So Your Honor, what respondents --
9 we are movants -- what movants are looking for is an order
10 stating that documents, what we've called fiscal plan
11 development materials, but they're documents responsive to
12 Requests 8, 16 and 17, are to be produced in discovery as
13 opposed to subject to I believe what the parties are calling
14 data room restrictions.

15 And we'd like an order with respect to the documents
16 in the data room now and any documents that may be produced in
17 the future because what we'd like is an orderly process by
18 which, when documents come in, we know they're discovery, we
19 know who we can use them with, we know who we can show them to
20 and under what circumstances.

21 I want to be clear on the narrow scope of what we're
22 looking for here. It will be under a protective order, so
23 respondents will have a chance, obviously, to designate them as
24 confidential, and there will be a procedure where, if we don't
25 agree with the confidentiality designation, we can try to meet

1 and confer and come to the court.

2 We also don't think that producing it in discovery
3 means it necessarily is admissible or usable in a court
4 proceeding. Just like discovery in every litigation I've done,
5 producing it in discovery is one thing. If you want to use it
6 in a court proceeding, the other side always has the chance to
7 say, No, it's not relevant; no, it's hearsay; no, the standard
8 for a plan adjustment should be X, not Y, and therefore it's
9 not relevant.

10 But what we movants feel is necessary here is a broad
11 order governing what's been produced and anything that will be
12 produced in the future going forward so we don't have to
13 constantly keep coming back to the court. Even since we filed
14 our motion, new fiscal plan development materials have been
15 posted to the data room. I saw an announcement this morning
16 that there's going to be revisions to the fiscal plan and it's
17 going to be recertified. There will be, I assume, a new model
18 and maybe other materials underlying that plan, so we need an
19 order to let this proceed in an orderly way.

20 I don't think we've had too much trouble with the
21 other side about what the fiscal plan development material is.
22 We just think these are discovery materials, and we need an
23 order, broad order so we're not fighting document-by-document
24 all the time, because that's just not workable in this
25 litigation.

1 THE COURT: Let me ask you this, though. Because you
2 did come up with this Exhibit B, which had 47 documents, which
3 seemed to me -- now, I have never seen the data room,
4 obviously.

5 MS. ZECCA: Correct.

6 THE COURT: So I don't really have a sense of whether
7 these are clearly documents that you would have agreed upon or
8 not. I felt that it was helpful for me at least to have you
9 identify the documents that you thought were at issue and then
10 be able to have a conversation with the other side to say, how
11 are these going to be designated with the burden being -- let's
12 assume for now that the burden would be on the respondents to
13 say, I'm designating them confidential or not.

14 Is it helpful, though, to have you identify what
15 documents you're talking about so that we don't get up in this
16 cycle of talking past each other about some of the documents?

17 MS. ZECCA: Perhaps, but I want to step back with what
18 I think the court -- I'm just not sure I follow the court's
19 question.

20 THE COURT: You're saying you want a blanket order
21 that says everything comes out of the room, subject to the
22 protective order.

23 MS. ZECCA: Correct.

24 THE COURT: But it seemed to me that part of the way
25 this whole thing started was there were groups of documents

1 that went in that were for mediation only, which are covered by
2 the protective order as mediation only, but that there was a
3 broader range of documents in the data room that went beyond
4 the fiscal plan material, and that it was helpful, I thought,
5 to have you identify specifically what you were talking about
6 so that we at least eliminated that initial dispute as to what
7 documents do we mean.

8 MS. ZECCA: So I think a little bit of yes and no.
9 There's four categories of documents in the data room, to my
10 mind, but they're not filed by these four categories. So there
11 are things that I think the parties can and have agreed are
12 factual data information, things like that that they have
13 already told us, We will deem these produced under 2004 once we
14 get a protective order. We're all good there.

15 There's documents that have been produced in other
16 litigation, in other adversary proceedings, COFINA proceedings,
17 et cetera. Those are actually in one place in the mediation
18 room again produced here. There's the fiscal plan development
19 materials, and then there are mediation materials.

20 Part of the -- one of the issues, though, is within
21 the mediation folder of the data room, they have filed things
22 that are fiscal plan development materials, not say a deck
23 created for a mediation session. So that makes it a little bit
24 confusing.

25 So the way Exhibit B came up is, because we went

1 through the data room after your order and said, Here is what
2 we think has been ordered produced, could be considered a
3 fiscal plan development material. A chunk of that they said,
4 Actually, we consider that factual information and data, so
5 there's no dispute here. I think a little bit of it they said,
6 That actually isn't a Commonwealth document. That's a
7 different Title III, so it's not covered by the 2004 order. We
8 agree with that.

9 And then there's the middle piece which are the fiscal
10 plan development materials. That's what's here. They didn't
11 agree to produce any of it pursuant to Rule 2004. But our
12 problem is, even since this, new materials are being posted to
13 the data room constantly. So we want a process -- so I think
14 we tried to do this to be helpful as to what was there in that
15 snapshot in time, but it's a growing room. They add documents
16 to the Commonwealth piece of it on a regular basis, and it's
17 unworkable for us to have to come to them every time something
18 gets posted and say, Will you agree to let us use this in
19 discovery or not?

20 We don't -- we haven't had trouble agreeing what
21 rubric it falls under; is it factual data, fiscal plan
22 development material, and we can say to them, This has been
23 posted, we think it's a factual, we think it's fiscal plan
24 development material, we think we should use it. But we do
25 need, we think, guidance from this court if it is a fiscal plan

1 development material, it falls within discovery and not under
2 the NDA or mediation instructions, or else we're going to be
3 constantly disagreeing and constantly back before you. I know
4 that in every fiscal plan development material we asked them to
5 produce, they said no.

6 I think that's going to be the case in the future,
7 with the one exception that they have told us that with respect
8 to the model underlying the certified fiscal plan, they'll
9 produce that in discovery. Although I will say that model is
10 currently sitting in a mediation folder, and without an order
11 of this court or consent from them, we can't use it in
12 discovery.

13 THE COURT: Is the dispute, though, whether or not
14 documents that are fiscal plan material documents need to be
15 produced absent a showing of good cause or -- I guess good
16 cause, or is the dispute that these are materials that are not
17 fiscal plan development materials?

18 MS. ZECCA: I think, unless there's an exception that
19 I'm not recalling, we agree that what's on Exhibit B are fiscal
20 plan development materials, and we also agree that, for
21 example, the model that's been posted to the data room, since
22 we filed, is also a fiscal plan development material.

23 I think the central question and the way the parties
24 each read the court's order differently is if it's a fiscal
25 plan development material, is it in discovery, subject to

1 protective order, you can designate it confidential, and
2 whether it gets used in court is different, you always have
3 your right to object to that, or whether, as they say, we have
4 to go to them on each material every time and ask if they'll
5 produce it and then when we disagree, come to the court,
6 because we're going to be back here and back here and back here
7 if that's the case.

8 THE COURT: Well, I don't know whether you'll be back
9 here or back here. I don't know whether or not designating the
10 materials gives you a concrete basis for discussion or not.
11 But go ahead.

12 MS. ZECCA: So as we see it, the Board has announced
13 that it wants to propose a plan adjustment for the Commonwealth
14 in 2019. I've read many government parties saying they want to
15 have the plan confirmed quickly. And that's why we're saying
16 we want a court-supervised process whereby these materials are
17 in discovery, and we can be working now to understand these
18 materials, to work with our own experts on these materials, and
19 to have a process whereby, instead of under the NDA where
20 everything is presumptively confidential and we have no ability
21 to challenge that, there's a dialogue, iterative process where
22 they designate and we can challenge.

23 I don't know if the court needs me to -- I'll start
24 with this. In respondents', I believe it's AAFAF's response,
25 they say that they've provided many materials to us and they

1 say that's basically the same as -- they intimate that's the
2 same as discovery, and it's not, for two really big reasons in
3 our mind.

4 One is, the use in litigation, and the NDA and the
5 mediation agreement are pretty clear. You can't use these in
6 discovery. You can't even attempt to use them in litigation.
7 So if it's sitting under the data room restrictions, as I'll
8 call it, the NDA or the mediation agreement, it's in a sealed
9 box as far as we're concerned. I can't even come to this court
10 and say, I think we should be able to use this and have them
11 say, We object, we think it's not admissible. It's just in a
12 black box. We think in a protective order situation, if it's
13 under the 2004 order, it's in discovery. We can attempt to use
14 it; they can object.

15 And second is the confidentiality designation process.
16 The court knows what a protective order does. Under the NDA
17 and the mediation agreement, it is confidential, and I have no
18 ability to challenge that confidentiality. Movants have no
19 ability to bring any issues about confidentiality to the court.
20 So it's exceptionally restrictive, and as we see it, it's
21 unnecessary.

22 We haven't heard any coherent -- any legal rationale
23 or any policy rationale for saying, This should not be subject
24 to discovery. Remember, there is a protective order. That
25 doesn't mean it's showing up publicly if they've designated it

1 confidential. Just because it's produced in discovery, that
2 doesn't mean it's admissible. But we do think we need a
3 process whereby it's in discovery.

4 THE COURT: In the process that you envision, would
5 they make the designation before they put it in the room or
6 after? When does that happen if you don't actually designate
7 the information that you're asking about?

8 MS. ZECCA: Designate it as a fiscal plan development
9 material?

10 THE COURT: Right.

11 MS. ZECCA: I think in my ideal world, if the court
12 ordered fiscal plan development materials produced under 2004,
13 there would be a folder in the data room for that production,
14 and they'd put it up in that folder so I'd know by virtue of
15 where they post it, that's how they see it. And that would
16 also, I suppose, allow if they put something instead in a
17 mediation folder that we think wasn't fairly mediation
18 material, we can have a meet-and-confer about that. But it
19 hasn't really -- that's not really been what the fight has been
20 about. The fight has been about are these discovery or not.

21 One thing we wanted to say, Your Honor, is that in
22 this case we've already seen multiple expedited proceedings.
23 The PREPA proceeding was one such proceeding. The movants --
24 not the movants. The Board originally asked for \$1.3 billion
25 of financing, I believe. The hearing was supposed to be just a

1 little bit, a week or two later. That eventually stretched out
2 to three or four weeks after the initial motion. I'm looking
3 at Mr. Horowitz because he has a more vivid memory of this than
4 I do. But it was a super-expedited discovery process and
5 deposition process, and I believe we did have one telephonic
6 motion with this court in the middle of a deposition.

7 The reason that worked is because those documents on
8 PREPA were all produced pursuant to a protective order. If
9 they had just been sitting in the black box of the data room, I
10 don't know how any of that works. And that's why in this case
11 where expedited proceedings happen, and they're going to pop
12 up, and they are going to need to be quick, we can't be
13 fighting about pulling fiscal plan development materials out of
14 the black box and into discovery. They need to be in discovery
15 so that we can have an orderly process to handle the expedited
16 proceeding and to prepare for the confirmation proceeding.

17 I think the confirmation proceeding may come upon us
18 very quickly. And when it does, right now, I'm not sure
19 whether under the black box restrictions it's okay to share a
20 fiscal plan development material, such as a model underlying a
21 draft plan or the old fiscal plan, the prior certified fiscal
22 plan, with a testifying expert because my testifying experts of
23 course are there for litigation. And the NDA says you can't
24 even attempt to use it for litigation. So that creates a
25 problem for movants as we try to prepare our case going

1 forward. And that's why we want it in discovery.

2 Another thing we set out in our brief is if we have
3 to, as they say, go to them on a case-by-case,
4 document-by-document basis, we're giving them some insight into
5 our internal deliberations and thought processes about what we
6 think is important. That's not normally your setup in
7 litigation. Normally the documents are produced and you don't
8 have to provide -- you don't have to provide a justification or
9 anything like that to your opposing party about why it comes in
10 in discovery.

11 THE COURT: As of the procedure that you're using now,
12 how do you know when something new is added to the room?

13 MS. ZECCA: There is an email alert that comes out
14 every time I think a document is added or once a day. It's one
15 of the two. I think that's what I had on why we want this
16 order, and I had a lot to tell you about the protective order
17 but now I don't have to.

18 What I do want to say, add one more thing, this is
19 just to be clear with the court. In the court's February 26
20 order, the court said -- I want to get your words right, it's
21 at page 7 -- the court assumed that production of 2018 fiscal
22 plan materials to the data room will mirror the types of
23 documents produced regarding the 2017 plan and that the
24 production will be sufficient to respond to the outstanding
25 request in the renewed motion.

1 At the time we were filing these papers, we had not
2 had a chance to fully study the models underlying the 2018
3 plan. We've done that. We are compiling, in consultation with
4 our financial advisors and our co-movants, we're compiling a
5 list of additional materials we think we need. We're obviously
6 going to get that to respondents and meet and confer with them
7 before bringing any disputes before the court. I hope we don't
8 have any. But I did want to let the court know that currently
9 we believe there are materials outstanding, but we haven't had
10 a chance to make that complete list and get that to respondents
11 to meet and confer about that yet.

12 THE COURT: Okay.

13 MR. HOROWITZ: Good afternoon, Your Honor. Gregory
14 Horowitz from Kramer Levin. I'm getting up today on behalf of
15 the PREPA movants on what was captioned a motion for joinder,
16 but I think Your Honor very appropriately and pragmatically
17 recharacterized it as a motion to compel. I think Your Honor
18 recognized we were just looking for the most judicially
19 efficient way of presenting essentially the same issue with
20 regard to the PREPA movants in the PREPA case.

21 I think just for context, Your Honor, so you
22 understand, the PREPA creditors sought 2004 discovery and
23 negotiated with the PREPA debtor a consensual stipulation and
24 order authorizing the 2004 discovery which Your Honor entered
25 on January 17 of this year. That order, that stipulation and

1 order contemplated a similar procedure to what was followed in
2 the Commonwealth case. We were allowed to serve discovery, our
3 document requests, and there was to be a meet-and-confer,
4 discussion of what disputes would be presented to Your Honor.

5 When we actually had the meet-and-confer scheduled,
6 the day I think we had the meet-and-confer scheduled was when
7 the debtors filed -- the PREPA debtor filed its urgent DIP
8 motion, and everything got sidetracked, Your Honor, in the DIP
9 discovery. And a substantial amount of material was produced
10 in connection with that contested matter. But as a result, we
11 are only just now revisiting the meet-and-confer process on the
12 2004 discovery, and to date in the PREPA case, there has been
13 no production pursuant to 2004.

14 We are negotiating with the debtors' counsel, and I'm
15 hopeful that we will resolve most, if not all, of our issues on
16 that, but it's possible we will be back before this court on
17 that.

18 In the meantime, we filed what was originally
19 captioned the Motion For Joinder so that we could get the same
20 material, which was a subset of the material we sought in our
21 2004 requests, the fiscal plan development material with regard
22 to the PREPA fiscal plan. I don't believe, Your Honor, there's
23 any dispute about what constitutes fiscal plan development
24 material, at least with regard to what has been posted in the
25 data room.

1 I think one dispute that I hope we can move past is
2 over the argument that creditors should have no need for 2004
3 discovery of these materials at this time because they've
4 received similar materials in the mediation in the data room.
5 I hoped that was a contention and an issue that had been
6 resolved when the mediators in connection with the Commonwealth
7 2004 motion issued their notice of breach of mediation
8 confidentiality, basically saying it's inappropriate to refer
9 to material, to refer to disclosure that's occurred in
10 connection with the mediation and that whatever is going on in
11 mediation, that's no substitute for the parties' rights in the
12 litigation and in the bankruptcy process. In other words,
13 mediation disclosure is not a substitute for 2004 discovery.

14 So in a way, the fact that there is material that's
15 been posted in the data room while, you know, in one respect
16 it's been very helpful, in another respect it's very confusing
17 because it should be irrelevant to whether or not the debtor
18 has complied with its obligations under 2004 or whether the
19 creditors have received the information that they're entitled
20 to under 2004.

21 Here again, Your Honor, I say I don't believe there's
22 any dispute as to what is fiscal plan material with regard to
23 the PREPA side. We're just asking in this regard, I simply
24 join in Ms. Zecca's arguments. We're just asking that that
25 material be ordered to be produced, not to be -- I don't like

1 the expression, with all due respect, Your Honor, released from
2 the room. It's being produced in the case pursuant to 2004.
3 It's just that, as a logistical matter, releasing it from the
4 room, de-designating it might be an easier way of doing it, but
5 I think as a logical matter, we should pretend that that room
6 doesn't exist and just say this material needs to be produced.

7 And we already have a protective order in place, Your
8 Honor, our protective order. I think all of the language that
9 was negotiated with regard to the Commonwealth order is simply
10 a clarification of what was always intended in our protective
11 order. I'm perfectly happy to have that clarification deemed
12 to be a gloss on the protective order that's already been
13 entered by Your Honor in the PREPA matter.

14 THE COURT: In the PREPA, though, why do you think
15 materials haven't been produced?

16 MR. HOROWITZ: There hasn't been any 2004 production.

17 THE COURT: You've got everything in connection with
18 the disputed motion?

19 MR. HOROWITZ: Well, we got a significant amount of
20 material in connection with the contested matter, the DIP
21 matter. We're still seeking -- and some of it, I think we
22 should be able to resolve a lot of it -- some other material
23 that we need in connection with our 2004 requests. That hasn't
24 been produced yet, but that hasn't been produced outside of the
25 data room, outside of mediation yet, but I'm hopeful that we'll

1 be able to resolve those issues.

2 The DIP motion was decided, it all feels like one long
3 day to me, Your Honor, but a couple of months ago at least.
4 And there's been some significant new material, including a new
5 PREPA fiscal plan. So there is more material out there that
6 has not been produced, except to the extent that it's been
7 provided in mediation, which again I submit is not production.

8 THE COURT: Under your confidentiality agreement, if
9 it's in the mediation folder, you have the right to contest
10 that?

11 MR. HOROWITZ: No, Your Honor. If it's in the
12 mediation folder, it's been produced in connection with
13 mediation.

14 THE COURT: And you don't have the opportunity then to
15 say it shouldn't be limited to that, or you do have the --

16 MR. HOROWITZ: Well, the only opportunity we have is
17 the opportunity we're taking advantage of today, Your Honor,
18 which is moving to compel the production of that material or
19 some subset of that material in 2004.

20 THE COURT: Right. But your confidentiality agreement
21 allows for that? The PREPA is the one that allowed to contest
22 the designations, correct?

23 MR. HOROWITZ: The PREPA protective order, which Your
24 Honor has entered, does not address and does not cover material
25 that's been produced in connection with the mediation.

1 THE COURT: Period, the end. And you don't have the
2 right in that one to either challenge that or not?

3 MR. HOROWITZ: No. That's simply a mediation
4 confidentiality. As far as I'm concerned, that is, to use
5 Ms. Zecca's phrase, a black box.

6 The only reason -- I shouldn't say the only reason, I
7 don't want to speak for the debtor, for the PREPA debtor. The
8 PREPA debtor has not gotten out ahead of the Commonwealth and
9 the Oversight Board and AAFAF on producing fiscal plan
10 development material pursuant to 2004 in our case, and I
11 believe they will not do so until Your Honor orders it in
12 connection with these motions.

13 THE COURT: Okay.

14 MR. HOROWITZ: Thank you, Your Honor.

15 THE COURT: Who is next? Who is opposing this,
16 anybody?

17 MS. McKEEN: Good afternoon, Your Honor. Liz McKeen
18 on behalf of AAFAF and respondents. I think in thinking about
19 these issues today, it's appropriate to focus on several
20 things. One is the good cause framework that your February 26
21 order teed up with respect to the fiscal plan development
22 materials.

23 Another thing I would like to focus on is the fact
24 that the way these conversations have developed, they've been
25 focused on the specific set of documents that were identified

1 in the motion to compel. And so in response to the question
2 that you posed of Ms. Zecca earlier, I think we view the
3 analysis and the question of whether it makes sense to continue
4 to have a document-by-document framework for these
5 conversations as being very helpful.

6 I think for a lot of the reasons you identified in
7 your original order, it helps to be granular and specific about
8 what documents are we talking about and what purpose they're
9 being used for and in what context. And so to the extent today
10 movants are talking about seeking a broad order with respect to
11 three really potentially large categories as opposed to
12 focussing on the 40 or so documents that are at issue in their
13 motion, I think it makes sense to resist that approach and to
14 really focus on what are the actual documents that we thought
15 we were coming here to talk about today.

16 And I think that I would agree that we share the
17 movants' view that these are in fact fiscal plan development
18 materials. I disagree that there haven't been any other fiscal
19 plan development materials produced. And in fact, part of what
20 we did after the court referenced the February 26 order as
21 Ms. Zecca referenced, we met and conferred and identified a
22 host of materials that we did agree to make available under the
23 protective order that were fiscal plan development materials,
24 including various models, debt slides, reconciliations of
25 expenditures, revenue comparisons, expense reports and the

1 like, and as we have just reconfirmed today, in connection with
2 the new plan that the Board recently certified and with any
3 plans that are certified in the future, have agreed to make
4 available all the models and data supporting those plans, not
5 only in the data room but subject to the terms of the
6 protective order so that they can be used in litigation and for
7 litigation purposes.

8 And I appreciate Ms. Zecca's observation that nothing
9 about producing something pursuant to a protective order would
10 waive our right to do things like challenge admissibility down
11 the road, but that doesn't really help us with respect to some
12 of the burden that would be associated with too broadly
13 interpreting what there has been good cause to conclude should
14 come under the protective order rather than being in the data
15 room.

16 And with respect to these 40 documents, I think what's
17 important is the extent to which these documents relate
18 exclusively to fiscal plans that are obsolete and no longer
19 operative. I think that is a big part of how we look at this
20 issue and the reason why we don't believe the movants have
21 demonstrated good cause at this point in the proceeding.

22 And let me say something about that. I think the way
23 we look at these documents, about 32 of the 40 or so relate
24 exclusively to what I'll call fiscal plan 1.0, which was the
25 version that was certified prior to the hurricanes. The other

1 eight or so support interim drafts of the post-hurricane fiscal
2 plans that were never certified. And from our perspective,
3 whatever else you think about these documents, which have been
4 made available to the movants under the data room restrictions,
5 we don't see that at this point in time when there hasn't been
6 a plan of adjustment proposed. And when there isn't any
7 pending litigation to which these old and obsolete materials
8 relate, that there really isn't good cause to take them out of
9 these restrictions.

10 And part of that is because of the burden that would
11 be associated with having to do things like prepare our own
12 witnesses and experts to then deal with how to explain these
13 documents when I think what we believe everybody ought to be
14 focused on is what is the fiscal plan that's actually going to
15 form the basis for the plan of adjustment. And it's a question
16 in our minds of where you draw that line in terms of allowing
17 this discovery to proceed. Because one thing that one could
18 very reasonably conclude is that at the time a plan of
19 adjustment is proposed, the movants may be able to come in and
20 say, Aha, there's something about the fiscal plan 1.0 material
21 that we think actually is relevant to an issue that's going to
22 be litigated here. It ties into this specific reason. But we
23 don't have that right now because plan adjustment is not on the
24 table, and we're sort of in the hypothetical universe of this
25 old obsolete stuff might be relevant in the future to some

1 unspecified litigation that's not happening right now. So we
2 don't think that constitutes the kind of good cause you were
3 contemplating under the order.

4 THE COURT: Let me just -- help me out here, okay?
5 Because I think when you first came in first couple of times --
6 and it's wonderful that some things get resolved by
7 stipulation, but that takes me out of the discussion, so I tend
8 to get this in bits and pieces.

9 At the beginning it seemed like we were talking about
10 an unbelievable burden of endless kinds of documents, all
11 right? So it made a lot of sense to me to say, Let's not waste
12 time with trying to sort through all of these documents and
13 figure out where they're going if most people aren't going to
14 be using them, right? That was my very practical thought
15 process. Here, though, I'm dealing with a list, which is down
16 to 40 documents, that everybody -- I think it's 40 by the time
17 you're done with the mediation room.

18 MS. McKEEN: Given or take.

19 THE COURT: Or even if I take 47, I'm talking about 47
20 documents out of a much larger group. To the extent that
21 they're historical, this is the world, right? I mean, this is
22 the 47 documents. From now on we're not dealing with the
23 historical 1.0 model. We're dealing with what happens in the
24 future. So why is it important to have this fight over these
25 47 documents and to not let them be part of the

1 confidentiality, if you believe they're confidential, not have
2 them be part of the production?

3 MS. McKEEN: Well, it's a good question, and I think
4 it's for precisely the reason you identified, which is, we do
5 want to be focused on, moving forward, what the actual fiscal
6 plan is and not what was underlying fiscal plan 1.0 because I
7 think if you were to conclude that good cause existed to
8 release, for example, the 32 documents that relate exclusively
9 to fiscal plan 1.0 from the data room restrictions, the
10 question would be okay, what other documents in the data room
11 might one make the same argument about.

12 I don't know that this fight would be happening if
13 anybody thought it was really just about these 40 documents and
14 then we're done. I think it's a question of are we going to
15 decide that even if something relates exclusively to a fiscal
16 plan that has been long since obsolete, is it fair game every
17 time an expert or a financial advisor is going to get deposed
18 in this case to have to ask that witness questions about that
19 document to prep the person to be deposed about those
20 documents. When we're in a universe where we're trying to
21 allocate scarce resources and there is no plan of adjustment on
22 the table, I think you could say, Look, without prejudice to
23 you raising this later, the good cause for these old documents
24 isn't here today, you have the backup for the current fiscal
25 plan, you will have the backup for any future certified fiscal

1 plan, why can't we focus on that for now, instead of hopping in
2 the Wayback Machine to fiscal plan 1.0. That's how we view it.

3 THE COURT: So it seems to me, since I don't know what
4 these documents are, other than their category number, there
5 certainly is an argument that says there's information there
6 that gives the movants information that they feel they can
7 compare, contrast, things change, whatever, but it did relate
8 to the fiscal condition of the Commonwealth. It's not like
9 they're irrelevant documents.

10 The way I'm kind of seeing it is if these 47 documents
11 are the world of historical documents that are in dispute, and
12 it seems to me that that's been the representation to me in
13 these pleadings, is that these are the world that we're
14 fighting about right now, if we deal with those as the
15 historical and say, Produce those as of 2004, and then in the
16 future documents are put in, I like that suggestion that the
17 documents be put in a folder that says fiscal plan development,
18 which gives you the right, the control over what documents you
19 believe are fiscal plan development documents. It gives the
20 movants here the right to challenge that in some form later,
21 and it seems to me a very practical way of moving forward while
22 you have control over where the documents go.

23 MS. McKEEN: I certainly think that's workable
24 prospectively. I don't think it alleviates our concern over
25 opening the door to discovery and sort of needless work around

1 old versions of the plan that are obsolete because the kinds of
2 -- I think one of the things that's important to recognize is
3 to the extent the plans and the models are based on things like
4 historical data and just, for an example, what were toll
5 revenues back in 2009, how does that work into the model. That
6 historical data is going to roll up to the current version of
7 the model and the current version of the plan. So it's not
8 like the old fiscal plan 1.0 documents are going to be
9 necessary to capture that same information.

10 It's not like there is historical data that's going to
11 be lost to the sands of time because we're not focused on the
12 other aspects of the plan that have been superseded, for
13 example, things like how we've changed our assumptions about
14 growth and out-migration as a result of the hurricane. That's
15 not about historical data. The historical data that forms the
16 basis of the plan is still going to be there. It's more about
17 how have our assumptions changed in light of all of the
18 developments. And that's not the same thing as hard data, like
19 what actually happened five years ago.

20 And to us, the comprehensive nature of the information
21 that's going to be in the model that supports the current
22 certified version of the fiscal plan I think warrants
23 continuing to place the burden on movants to say, Look, if you
24 have identified something specific that underlies this old
25 fiscal plan stuff that you do think you need, come forward,

1 let's talk about it in the context of the plan of adjustment
2 when we can be concrete about why you think it's necessary, as
3 opposed to the sort of hypothetical inchoate conversation
4 about, Oh, in theory it's all numbers, and maybe there's
5 something in here that's relevant, let's throw it in the pile
6 and see what happens. We don't think that constitutes good
7 cause just because it's another version of something that
8 happened a while ago.

9 THE COURT: No, but I feel like you're asking me to
10 make a distinction and I'm missing some nuances. There's going
11 to be a lot of facts out here. Some are going to be more
12 relevant than others. There will be fights over different
13 things. If we really are talking about 47 documents, do they
14 really change the presentation so dramatically?

15 MS. McKEEN: Well, some of the documents are in and of
16 themselves one document, the entire fiscal plan model, so it's
17 not like a document equals a sheet of paper in this. One
18 document could represent an Excel spreadsheet with 500 tabs.
19 So I think to call them 47 documents is to narrow the universe
20 and be specific about what we're talking about, but I would not
21 want you to get the impression that we're talking about a
22 necessarily narrow set of data information because some of
23 these documents themselves are extremely voluminous.

24 And to be fair, I think if we were really just talking
25 about these 47 documents, Ms. Zecca wouldn't have been so

1 careful to insist that she really doesn't want to talk about
2 the 47 documents, she really wants an order from of you as to
3 these three specific categories of discovery, which is the
4 first thing she brought up today. So I wish I could believe
5 that that fight is about 40 documents, but I think we're all
6 worried that it's not, on this side of the table.

7 THE COURT: Okay. What if it was, though, these 47
8 documents were the historical information and that in the
9 future you have the right to designate things that go into the
10 fiscal plan development folder, which would automatically be
11 subject to the protective order? And then I understand that
12 the movants would be able -- they have information about what
13 else you're putting in the data room, right? So there can be a
14 mechanism where that designation is challenged, right? You're
15 not including enough or whatever, and then we're fighting over
16 specific documents. Does that sound workable?

17 MS. McKEEN: So here is what I'll say about that. I
18 think on a prospective basis it sounds workable. Obviously,
19 subject to the views of my co-counsel on that, I think it
20 doesn't alleviate my concern about having potentially
21 unnecessary litigation and discovery around completely
22 superseded models. Again, the 47 documents, to the extent they
23 include voluminous models, it would be our preference to not
24 have those come out from under the restrictions at this time
25 without the kind of showing of good cause that the court

1 previously held was lacking, but I certainly think if movants
2 would say there is nothing related to a prior or now no longer
3 operative version of an old fiscal plan that we're going to
4 seek besides the 47 documents that we've already sought in this
5 motion, we could have a conversation about that, but I don't
6 think they've made any such representation. And I think what's
7 clear is that the set will only become larger and larger and
8 larger as we move forward.

9 I think if we were to start thinking about the
10 universe in terms of what's currently certified and what will
11 be certified in the future and let's focus on that rather than
12 focusing on the past, that would be the most helpful framework
13 subject to movants' ability to always come in and say, There is
14 something in these documents that relates to an old fiscal plan
15 that there is good cause for us to use, here is what it is, as
16 opposed to saying it relates to fiscal plan stuff, because
17 that's all we have now.

18 THE COURT: So I think things have changed, and I
19 think that given the unpredictability of the way issues arise
20 that things have changed about whether there's good cause to
21 have these documents produced under 2004, okay? I do think
22 that we're now in the 2004 world of production. And I do have
23 a better sense, maybe, that we're talking about at least a
24 category of documents that the parties can generally agree upon
25 and that you've been able to work together to identify those

1 documents at least from the present moving forward. So I am
2 prepared to order that the fiscal plan development documents at
3 least in the future, or present to the future, plan are being
4 produced under 2004 but subject to the protective order.

5 MS. McKEEN: Your Honor, as part of that ruling, I
6 think what we would want, if it makes sense to you in terms of
7 trying to be practical, is some mechanism by which we can then
8 seek a protective order or some other form of relief. For
9 example, if some of these old fiscal plan materials seem like
10 they're being used in a way that isn't relevant, isn't
11 constructive, isn't within the bounds of appropriate
12 discovery --

13 THE COURT: Let me just put those aside for the
14 minute. Let's deal with the new, moving forward.

15 MS. McKEEN: Okay.

16 THE COURT: Okay. If we create a system where you
17 have control over what you designate as fiscal plan
18 development, recognizing that if you so designated it, it will
19 be produced under 2004 subject to the confidentiality
20 agreement, your agreement provides for a mechanism where the
21 movants can challenge whether other materials should also be
22 included, and we can have that on a more specific basis. Does
23 that work? And then set up a time period where you can
24 designate the level of restriction of the fiscal plan
25 development documents, right, because some of those will be

1 confidential and some won't.

2 MS. McKEEN: I think that's right, Your Honor.

3 THE COURT: So if we set up a period of time for you
4 to be able to do that, does that take care of the future?

5 MS. McKEEN: I think that takes care of the future.

6 THE COURT: Okay. So then I'll hear from other
7 people, but I'm sort of getting -- nobody's throwing anything,
8 so I'm sort of assuming that people are generally on the same
9 wavelength. So let's assume that's going on in the future.

10 Now let me hear from Mrs. Zecca on -- I'm going to
11 call them the 47 historical documents. And I do think that it
12 may be appropriate -- okay. Maybe not you?

13 MR. MASHBERG: Can I just go? I'm going to be very
14 brief, Your Honor.

15 THE COURT: I do think it may be appropriate for us to
16 think about, once depositions happen, if there's a way to make
17 sure that we're going forward efficiently on those. Maybe
18 there's a way to predesignate documents and have a fight about
19 it in that way. We've certainly done than in a number of
20 cases.

21 I don't know because I don't really have a sense of
22 how the depositions are going to come up because I don't know
23 if they're going to come up in the context of a specific fight
24 over a motion or if they're going to come up with the plan. I
25 just don't have that sense. Sir.

1 MR. MASHBERG: Your Honor, again, Gregg Mashberg from
2 Proskauer on behalf of the Oversight Board. I'm not going to
3 repeat anything Ms. McKeen said, which I agree and adopt. I
4 want to make a couple of points. First of all, on the issue of
5 the applicability of Rule 2004, the fiscal plan development
6 documents, Your Honor of course already ruled on that on
7 February 26 on page 7 of your order, and you made it very
8 clear, and that is that matter is behind us.

9 THE COURT: I thought I made it clear but nobody
10 agrees on what I said.

20 And now I'm hearing movants wanting this much broader
21 order covering the universe of documents without even
22 mentioning the 47. That's fine. And I understand the point
23 that Your Honor is making, is that we really should -- things
24 have changed, the world is moving on, and we should find a
25 mechanism to avoid having to come back in a piecemeal fashion,

1 but I think the parties should now be put in the position of
2 negotiating that in the first instance, that we should be
3 meeting and conferring on how to go forward.

4 I want it to be clear that the fiscal plan for 2018,
5 the certified fiscal plan is public, the model is in the data
6 room, all the tabs are there, and those will all be made
7 available pursuant to the protective order. That's really
8 going to be the nuts and the bolts of the 2018 fiscal plan
9 materials, the development materials. It's going to be there.
10 The questions are going to be answered by what is going to be
11 now subject to the protective order once we have that entered.

12 To the extent that we have other issues, I don't think
13 they're properly before the court. I think they're amorphous,
14 and I think the parties should have the opportunity for us to
15 sit down between ourselves and come up with a proposal for the
16 court, and to the extent we can agree, we'll do that; and where
17 we can't agree, then we'll let the court know, but I feel I'm
18 in kind of like in an ether here as to exactly what the court
19 is being asked to do beyond this motion to compel.

20 THE COURT: Well, the way I read the motion to compel
21 was these 47 documents but a request for a broader order for
22 the future. But I read it as the 47 were the extent of the
23 historical information. Maybe I'm wrong. Sir.

24 MR. DAVIS: Good afternoon. Joe Davis of Greenberg
25 Traurig on behalf of AAFAF --

1 THE COURT: I'm sorry?

2 MR. DAVIS: It's a pleasure to be able to walk to
3 court instead of getting on an airplane.

4 Your Honor, we hear you as to how you would like to
5 handle the existing documents, the historical documents if you
6 will. With regard to PREPA, I believe it was seven documents.
7 It was approximately 40 with regard to the Commonwealth. But
8 to reiterate something that Mr. Mashberg raised and Ms. McKeen
9 was alluding to, we've gotten through the portion of the motion
10 that was articulated with some level of specificity so we would
11 know what we are doing. If I were in your shoes, what I would
12 be wondering is what is it that people want next.

13 The February 26 order is a prospective order. It sets
14 forth a process by which documents are to be evaluated for
15 purposes of whether they should be produced, and there's no
16 reason to suggest that that mechanism is working wrong.
17 There's certainly no evidence before you that it's working
18 improperly. We have a motion here of 47 documents. We're
19 dealing with that. There's a protective order in the PREPA
20 case already in place. It's functioning just fine with regard
21 to the existing Rule 2004s that were referenced by
22 Mr. Horowitz. An enormous amount of material was produced in
23 connection with the DIP fight. The Rule 2004 request largely
24 focused on the anticipated DIP fight because we all knew that
25 PREPA was going to at some point run out of money for all the

1 obvious reasons. I typically teach my associates to use
2 metaphors in their arguments, but the thing about the PREPA
3 situation, Puerto Rico in general and PREPA particularly is
4 there is no metaphor that is more dramatic or compelling than
5 what happened with the hurricanes. So everybody knew PREPA was
6 going to run out of money. And we produced documents
7 consistent with that.

8 Approximately a week ago we received a letter that has
9 started up the balance of the Rule 2004 process, so there's no
10 suggestion that isn't working the way it should. And I'm
11 worried now that there's some request for some sort of
12 broad-based relief from you that is in the absence of the
13 parties' experience and certainly in the absence of any
14 meet-and-confer. If you look carefully at the motion papers
15 with regard to PREPA, the only meet-and-confer that we had was
16 over the procedural mechanism to get this before you. We
17 didn't have a substantive meet-and-confer even though it was
18 seven documents. So I'm okay with dealing with the seven
19 documents in the context of the existing protective order, and
20 my prediction is we will all be back in front of you to deal
21 with whether they're confidential, but hopefully that doesn't
22 turn out to be the case.

23 THE COURT: But why are you here at all? Just because
24 you can walk over. Because on the one hand you tell me that
25 you have a process that's working, and then I get a filing that

1 says nothing has been produced. So there's a disconnect here
2 that has a nuance to it that I'm not picking up. I apologize.

3 MR. DAVIS: We didn't draft the motions.

4 THE COURT: It got filed, so not everybody thinks it's
5 working.

6 MR. DAVIS: But it's not as if there's a lack of
7 documentation that's been provided. In fact, in terms of
8 transparency, because of the data room process, all of the
9 movants have the information. In the ordinary course there is
10 a motion to compel filed because there's a body of documents
11 out there nobody has seen.

12 This is an unusual situation. They've got the
13 documents. We have all seen the documents. The question is
14 whether they're now being produced. And Your Honor has been
15 very clear that you wouldn't treat those under the terms of the
16 protective order at which point they will be deemed produced,
17 is my expectation of your order. And if we're talking about
18 the 47 documents in question, that's something all of us can
19 handle.

20 I am concerned that there is now an abstraction being
21 introduced into the proceeding that is not so precise because
22 it hasn't been dealt with. That's my concern, is that whatever
23 we're going to do hereafter in this hearing, it's going to be
24 going down the path of some sort of an order that's divorced,
25 if you will, from the actual litigation. Because as Your Honor

1 knows, this is an unusual state in that among other things
2 there's no contested matter pending, there's no adversary
3 proceeding that this emanates out of. There's no plan of
4 arrangement on file. We're dealing with this somewhat in the
5 abstract. And it would be a preference of the respondents that
6 we not have to deal with orders that produce -- that provide or
7 require further behavioral limitations that are also going to
8 be issued in the abstract.

9 THE COURT: So under the PREPA order, how do you
10 handle the new documents that are going in the room? Where do
11 they fall into the disclosure?

12 MR. DAVIS: We're literally dealing with it for the
13 first time, in that -- well, actually PREPA is a good example
14 because PREPA is an operating entity in addition to being a
15 governmental entity. So PREPA has weekly reporting under the
16 DIP order that goes into the data room. So there's a constant
17 flow of data in the data room.

18 The first time we were asked to deal with any
19 documents outside the mediation and NDAs that are attendant to
20 the data room are the seven documents that we're fighting about
21 now, except back in February. And back in February we worked
22 it all out. Evidence was put on. Depositions took place. It
23 worked pretty seamlessly. There were not motions to compel
24 additional documents or designation fights.

25 THE COURT: How did it work?

1 MR. DAVIS: How did it work in February?

2 THE COURT: Yes.

3 MR. DAVIS: Very pragmatically. I would receive
4 requests from movants that they want to produce a certain
5 amount of documents. We would make them available as fast as
6 we could to the extent they weren't already available, but
7 obviously there were additional documents that were produced.
8 They were then used under a confidentiality designation --
9 confidential designation in the various depositions and at the
10 hearing. And I honestly don't remember anybody calling and
11 fighting over the designation of any document.

12 THE COURT: All right. So what the movants are saying
13 to me now is that when things like this happen, it's too
14 compressed and too crazy to be doing it on an item-by-item
15 basis because they can't predict when the next motion is coming
16 or when the next analysis needs to be done. I think that's
17 what I'm hearing. So they're saying, Can we come up with a
18 process that makes it go more smoothly. It seems to me
19 everybody is sort of past the fight of are these documents
20 appropriate in the 2004 context now that we're dealing with the
21 certified plans. So we're past that.

22 My concern in February was that I didn't know if we
23 were talking about rooms full of documents or categorized
24 documents. The process that I had envisioned is actually what
25 happened, which was, you know, the movants say these are the 47

1 we're talking about, what's the fight? So that all worked. I
2 know we're still talking about the 47, but those worked. But I
3 think it's legitimate, and I'm not prepared to -- I'm prepared
4 to give you the opportunity to work on the way it should
5 happen. But conceptually, if we agree that these documents are
6 appropriately 2004 documents, if there are -- I like the idea
7 and you all need to think about it more, but I think the idea
8 of having the initial designation come from the respondents to
9 say, We're all agreeing that these are the fiscal plan
10 development documents and they're going to be subject to the
11 protective order. I like the idea of it being a separate
12 folder where you don't need my involvement in that. That
13 happens. All right? So I certainly will give you an
14 opportunity to work out the details of that, but I'm not sure
15 we're really fighting about a whole lot here.

16 MR. DAVIS: I would hope that we're not. But as I
17 said, movants have made comments in this hearing that would
18 indicate that they're looking for something more, and it's the
19 more that we are concerned about. Managing the existing data,
20 if you will, is something we can all get our arms around
21 because we know what it is.

22 Here is an example, Your Honor. Emergencies happen in
23 bankruptcies. They happen in every one. Sometimes you can
24 anticipate it coming up. Sometimes you can't. It's like
25 injunctions, very much like injunctions. Sometimes you can see

1 it coming, but oftentimes you can't. And so there's a flurry
2 of activity. The nature of restructurings is filled with
3 emergencies because everyone shows up harmed. Everybody is in
4 an impaired state in a bankruptcy. So in the context of trying
5 to avoid rapid activity, if you will, and quick e-discovery,
6 you can only anticipate what is obvious, which is to say yes,
7 at some point a planned arrangement will be filed. Clearly
8 that's going to happen. And so if we're talking about
9 discovery that ultimately related to that process, at least we
10 as the parties understand then roughly at least what the
11 parameters of that would look like.

12 But in terms of anticipating fights that we cannot
13 project, whether it's a financing fight, whether it's some sort
14 of regulatory -- whatever it is, we're not soothsayers, and
15 discovery wasn't set forth for situations where there isn't a
16 definitive structure in place, a procedure in place in order to
17 go forward.

18 THE COURT: So do you agree or not that the fiscal
19 plan development documents that are being generated I guess now
20 and for the plan that will be certified are producible under
21 2004?

22 MR. DAVIS: Going forward?

23 THE COURT: Yes.

24 MR. DAVIS: I can only speak for PREPA. And in terms
25 of certified fiscal plans, it's always our intention to be

1 transparent and produce those, so yes would be the answer.

2 THE COURT: Is there any problem for them to be
3 produced sooner rather than later? Because I just remember
4 from the first hearing us having a discussion that said we
5 don't want to end up at the end and starting all over with
6 discovery.

7 MR. DAVIS: To be fair, Your Honor, first of all, just
8 in full disclosure, PREPA wasn't a party to the first hearing.

9 THE COURT: I'm not holding you to -- it wasn't a
10 court ruling. It was just a sense of, if everybody is working
11 together to make sure that appropriate things are disclosed.

12 MR. DAVIS: Correct. We think it's a manageable
13 process. We are certainly committed to being transparent about
14 it. And I don't think we will have fights over that part of
15 it, which is why I don't think there's a necessity for any
16 additional orders with regard to them because I think everybody
17 knows how to act, other than the protective order, but again in
18 the PREPA case, we already have the protective order and
19 there's about to be one in the Commonwealth case. It's the
20 past part that we have a discussion today about, and again,
21 that's a classic discovery dispute, and that was one that we
22 could articulate.

23 THE COURT: All right. So for the seven documents,
24 what's your position?

25 MR. DAVIS: We would prefer that they not be deemed

1 producible now. We hear Your Honor's message, and I'm not
2 going to swim against the stream if I don't have to. We have a
3 protective order in place, and we will treat them in accordance
4 with the protective order.

5 THE COURT: Thank you. I think it's back in your
6 court, Ms. Zecca.

7 MS. ZECCA: So going forward, I think we understand
8 what the court is inclined to do as a process. And I just
9 wanted to note that the fiscal plan development materials,
10 that's a shorthand the parties developed for documents
11 responsive to requests 8, 16 and 17 of our initial requests, so
12 that's what we're talking about. And if there are responsive
13 documents, they go in that folder. And if it is something
14 created especially for mediation, it's a mediation material. I
15 think that's the dynamic.

16 THE COURT: And the process that you will develop will
17 allow for a challenge to specific documents, and the court can
18 resolve that?

19 This is my problem. This is why I don't want to write
20 the words as to say which are the fiscal plan development
21 documents because everybody nods at me and everybody says they
22 agree on the words and then they don't all agree on a specific
23 document. So I'm envisioning a process where that happens,
24 where you're able to eliminate the ones that are just not in
25 dispute. You know, the producing party has so designated them,

1 it moves forward. And then there's a mechanism when you turn
2 around and if you say, Look, I think this should fall into that
3 category and they say no, there's a way to resolve that.

4 MS. ZECCA: We agree with that, Your Honor. I was
5 just pointing out that's a shorthand for three specific
6 document requests, so it's not a -- it's not a limitless
7 conceptual concept. We have three requests. That was our
8 shorthand description for those three requests. That's what
9 we're talking about.

10 THE COURT: Okay.

11 MS. ZECCA: I think that takes care of going forward.
12 Historical, I can represent that the 47 documents in our motion
13 were everything in the data room that movants considered a
14 fiscal plan development material as of the date we filed, which
15 is I think April 9. So we're not going to go back and say, Oh,
16 there's this other thing that went up last August that --
17 that's our list of what was there as of the time of the motion.

18 I think there's a couple of documents that have been
19 posted in the interim, and my recollection is they are only
20 models, certainly the model underlying the current certified
21 fiscal plan, which respondents I think agree to produce
22 pursuant to Rule 2004. There might be one other model that was
23 posted for one of the Commonwealth draft fiscal plans, but
24 that's it. But it's not -- Your Honor, the court is right this
25 is not a huge volume of documents of what's in the data room.

1 As for the 47, we think those should be produced.
2 It's not a lot of documents. In fact, I think six or seven of
3 them they said in their opposition are factual materials and
4 will be produced anyway. And we don't believe we should have
5 to make the kind of specialized good cause showing that I heard
6 respondents' counsel articulate. That essentially requires us
7 to say why we need to use the documents or why they're relevant
8 to this specific time. That's really revealing our litigation
9 strategy.

10 The fact is the court has already found, correctly so,
11 these display the historical, present and future financial
12 condition of the debtor. Therefore, that should be sufficient
13 for them to be produced under Rule 2004. It's not that many
14 documents. The only burden argument I heard is them saying we
15 don't want to have to prepare witnesses on these because we
16 think the only thing that's relevant is the certified plan
17 going forward.

18 I think the court actually articulated our position,
19 which is, the certified plan, you have a certified plan. You
20 might want to compare and contrast what was done in the past.
21 That is something parties typically do in discovery. That's
22 something we may want to do here. And that's why the
23 historical documents need to be shown in discovery and analyzed
24 for these purposes, and it's really, we're talking about the 40
25 to 47 documents. It's not that many documents.

1 And I would say respondents may not think that's
2 important or where they want to focus, but it's relevant to the
3 financial condition of the debtor. And movants may think it's
4 important to focus on that. Movants' plan of adjustment may
5 want to say we need to look back at what happened in the 2017
6 certified fiscal plan because there's an important element of
7 that that's been jettisoned here that shouldn't have been.
8 Respondents may not want to do that but movants may, and that
9 should be our choice to do it. And given the limited number of
10 documents, there's no reason not to enter that order now.

11 I will also say I heard Ms. McKeen say that you don't
12 need to produce the old documents because some of that same
13 information is getting rolled up into newer documents. Then
14 fine, that just reduces the burden on them. If they're going
15 to be preparing their witnesses on new documents anyway, then
16 they'll be comparing them on the same materials. But for 40
17 documents that are clearly relevant to the financial condition
18 of the debtor, we think there's no reason not to have those
19 produced right now.

20 THE COURT: So Ms. McKeen, let me just confirm,
21 though, we all agree that these documents do relate to the
22 financial condition of the debtor. It's just a question of
23 whether it's relevant data because the certified plan is no
24 longer operative? Are there documents within these that you
25 want to challenge as being covered by 2004, or is it just

1 easier to say, we'll live with 47, but we hear that this is the
2 end of the historical data?

3 MS. McKEEN: Like Mr. Davis said, I don't want to swim
4 upstream here. I think that sort of intellectual tussle we
5 have with it is the idea that these old historical plans and
6 models I think don't necessarily shed light on the current
7 financial condition of the debtor. Of course when movants
8 filed their 2004 papers, what they represented that they were
9 seeking was information that they said was directly relevant to
10 the current and projected financial condition of the
11 Commonwealth. And now what I hear is sneaking in this word
12 "historical" when of course that's not actually the purpose of
13 Rule 2004 discovery. But again, we just have kind of a tussle
14 over the relevance of things that are now obsolete.

15 THE COURT: So I'm not -- you may be 100 percent right
16 that they're irrelevant, but I'm not prepared to make that
17 ruling in an abstract. So I think it is fair to say that we
18 have a representation that is binding that these 47 documents
19 are the remaining documents that the movants believe are fiscal
20 plan development documents through April 8 or --

21 MS. ZECCA: I think 9th is the date we filed, Your
22 Honor.

23 THE COURT: -- April 9 of what has been produced
24 that's in the data room. All right. Those will be deemed
25 produced subject to the protective order that you're all about

1 to agree on. And if you don't agree it on it, you'll let me
2 know. Sir?

3 MR. HOROWITZ: Thank you, Your Honor. Greg Horowitz
4 on behalf of the PREPA movants again. Just closing the loop,
5 I'm hoping that the court is ready to also give an order with
6 regard to the seven PREPA documents.

7 THE COURT: Yes.

8 MR. HOROWITZ: What we didn't hear or address and get
9 is a commitment along the lines of the Commonwealth commitment
10 to produce future fiscal plan development materials with regard
11 to PREPA in a PREPA folder along the same lines. There are
12 subsequent materials, there's a new model in connection with
13 the new PREPA plan that's not included, for example, in those
14 seven documents to my understanding.

15 THE COURT: So the only disconnect I'm hearing is
16 whether or not you need that order or whether you believe it's
17 covered by your confidentiality agreement already. Like, if
18 I'm hearing that it's working --

19 MR. HOROWITZ: Your Honor, I think I need to be a
20 little clearer on this. There has been material produced in
21 several different contexts. One is that material was produced
22 into a data room. "Data room" is unfortunately an ambiguous
23 term in this case. It's used for a lot of different things.
24 In connection with the DIP motion as a contested matter, that
25 was real produced material, and it was produced subject to a

1 protective order like ordinary litigation. There was also, as
2 Mr. Davis correctly referred to, when there was a final
3 conceptual DIP order entered, there were certain reporting
4 requirements that were imposed on that, that material had to be
5 produced, which would be available to the PREPA creditors. And
6 that has also been produced, I believe in the data room. That
7 is not -- that's not produced in mediation. That's not subject
8 to the mediation confidentiality agreement, so that's a
9 separate set of information.

10 And then there is material that has been produced only
11 in connection with mediation, the material that I said people
12 really shouldn't be properly be referring to. The seven PREPA
13 fiscal plan development materials we referenced in the letter
14 have been produced, have been put into a mediation data room in
15 that context, and that's what we're seeking an order that they
16 will be deemed produced on. That was lousy syntax, but I think
17 you understood what I was saying.

18 THE COURT: So was the concern again on the number,
19 that it was opening the door, or is this -- this is the
20 swimming upstream. Can we just say that these seven documents
21 are produced subject to 2004, subject to the confidentiality
22 agreement?

23 MR. DAVIS: Subject to the protective order, yes, Your
24 Honor.

25 THE COURT: Yes. I'm sorry. Subject to the

1 protective order.

2 MR. HOROWITZ: I was just extending that, Your Honor.
3 There has subsequently been additional information, a model
4 supporting the new PREPA fiscal plan that's also been produced
5 in the context of mediation we need to also have included in
6 that commitment and then --

7 THE COURT: So I'm not going to do that, right? I'm
8 going to do this is historical as of April 10 or 8 or whatever
9 date it is as of the filing of the motions. I think I need to
10 give you all a little time to come up with what happens in the
11 future, but the expectation is that what you come up with is a
12 way to get these types of financial plan development material
13 put into a format without me having to vote on every document,
14 where they will be produced subject to the protective orders
15 that you've agreed on both in PREPA and otherwise, and that
16 there be a mechanism for disputing of whether additional
17 material should be put into that category. And there needs to
18 be -- do I need to rule on when it gets designated? I leave it
19 to you. See if you can work out at what point the designation
20 of confidential or not --

21 MR. HOROWITZ: I think the parties were going to pick
22 out --

23 THE COURT: The expectation is it would be sooner
24 rather than later.

25 MR. DAVIS: Yes, Your Honor.

1 THE COURT: So if I say -- how much time do you think
2 it will take, reasonably?

3 MR. HOROWITZ: To work out a mechanism for the parties
4 to agree?

5 THE COURT: To move forward.

6 MS. McKEEN: Two weeks.

7 MS. ZECCA: Two weeks.

8 THE COURT: Two days? Oh, two weeks. I thought you
9 said two days. Two weeks. You have two weeks. All right. So
10 that's both PREPA and other. Okay?

11 MR. HOROWITZ: To be clear, Your Honor, that's two
12 weeks for the mechanism going forward, not for the material
13 that's already been identified?

14 THE COURT: Well, you're still -- I'm expecting within
15 the two weeks -- I don't see that there's a crisis within these
16 two weeks to have these documents, is there, that I'm missing?

17 MR. DAVIS: No, Your Honor.

18 THE COURT: Because you still have to finalize the
19 confidentiality agreement, right? There is, I guess my order
20 will say that I've accepted and is binding absent an act of God
21 that these are the documents that are in dispute historically,
22 have been identified in connection with these motions, all
23 right, and that going forward that's the mechanism that you'll
24 come up with.

25 I keep thinking I'm really clear, and then everybody

1 tells me that I say things differently, so I don't know. Okay?

2 MR. HOROWITZ: Thank you.

3 THE COURT: Everybody is sort of nodding at me. All
4 right. Sir?

5 MR. BASSETT: Very briefly, Your Honor. Nicholas
6 Bassett from Paul Hastings on behalf of unsecured creditors.
7 We did not file a motion to compel today, but we did file
8 joinders in the original Rule 2004 motion and the renewed
9 motion. And I would just like to say that as a joinder in
10 those motions, we would expect to have the benefit of the
11 court's ruling today and have access to any information that is
12 produced, and of course we are willing to sign any protective
13 order that the parties agree to. Thank you, Your Honor.

14 THE COURT: Does that raise any issues that anybody
15 needs to respond to?

16 MR. DAVIS: No, Your Honor.

17 THE COURT: Okay. So you have two weeks to come up
18 with the future. In the past, what I've ruled on is that these
19 documents will be subject -- will be deemed produced subject to
20 the protective orders that you're negotiating. And that's the
21 47 and 7 or 40 and 7. I don't even know how many I should say.
22 Whatever has been identified in your motions.

23 MR. HOROWITZ: Just for clarity for the record, Your
24 Honor, in PREPA we actually do have an agreed and entered
25 protective order.

1 THE COURT: Right. But I thought you were going to
2 change some of the words to make them consistent?

3 MR. HOROWITZ: I don't know that anybody thought there
4 was any need for that, Your Honor.

5 THE COURT: Okay. So then you're subject to it. And
6 you know which seven documents you're talking about? Everybody
7 knows which ones you're talking about?

8 MR. DAVIS: Yes, Your Honor.

9 THE COURT: Everybody but me. There you go. Okay.
10 Does that deal with the motion to compel? Good.

11 Now my favorite subject, the motion to remand. Here
12 you are back at where I thought you would be without a detour.
13 Welcome.

14 MS. HALSTEAD: Thank you. Good afternoon, Your Honor.
15 Ellen Halstead of Cadwalader, Wickersham & Taft, for Assured
16 Guaranty. I guess, Your Honor, you can let me know how you
17 want to proceed. I was planning just to go through the issues
18 of the parties and identify in joinder for threshold legal
19 issues.

20 THE COURT: So part of my issue with your threshold
21 legal issues is they're very fact-specific, so I think that we
22 need to deal with those kind of issues in the context of the
23 chart, the privilege log. Like, how do -- I'm not sure how
24 these issues get presented to me in the context of the log, but
25 I'm hoping it's easier.

1 I mean, I'm hoping, like when you say to me there are
2 differences between, if it goes to the Oversight Board, that's
3 a waiver of privilege. Can we do that sort of categorically
4 based on the descriptions in the log? I'm open to suggestions.

5 MS. HALSTEAD: Well, quite frankly, Your Honor, the
6 movants' thinking was that we would select documents for in
7 camera review to you. And the protocol that we proposed was
8 taking about approximately 12 categories on the logs, having
9 the respondents collect those documents from those categories
10 and submitting those documents to you in camera. Then Your
11 Honor can decide if you want to view two documents in a
12 category or 50. It would certainly be up to the court.

13 When we brought that proposal to the other side, they
14 said they couldn't do that because they had never collected the
15 documents. And so having identified the documents, having
16 reviewed the documents and don't have them in some sort of data
17 room where you could easily say, if we cited 12 categories for
18 in camera review, they apparently can't do that right now. So
19 I think that's a problem.

20 And we do, we do recognize that the threshold legal
21 issues must might be easier to resolve if you are able to see
22 the documents. We think that the court, though, could also
23 give guidance on legal issues that may allow us to move forward
24 on disputing various categories in the logs.

25 THE COURT: I'm happy to talk about it in that

1 context, but it seems to me that everybody sort of knows the
2 law, and you're all citing the same cases about the law. So it
3 really does become a very practical ruling, you know. Maybe.
4 I guess the ruling is maybe, sometimes, it depends. You know,
5 there is an issue on sort of should there be a universal ruling
6 that nothing should be privileged because of the balance --

7 MS. HALSTEAD: Yes, yes, that is an issue, yes.

8 THE COURT: And maybe that we need to set up a process
9 for how do we show that. But my guess is that there's a more
10 practical argument because even that's going to come out as
11 sometimes. My guess is that there are some documents that
12 maybe really are privileged that really shouldn't be disclosed.
13 I don't know. I want the case where there's only one document,
14 and then the judges get to write a decision about the one
15 document on whether it's privileged or not. I can do that.

16 So I'm trying to figure out really what the most
17 efficient way is forward with this. I do think that it is
18 problematic that there aren't folders of documents. I mean, it
19 does alter the discussion.

20 MS. HALSTEAD: Yes.

21 THE COURT: I don't have an easy answer. But when you
22 say 12 categories, maybe that's the beginning of your
23 conversation with the other side that says these are really the
24 categories that we're looking at. You know, how do we go
25 forward with that? It seems to me some of these are more

1 clearly privileged than others. Some of your concerns maybe
2 need to be refined. Are there specific consultants that you're
3 really challenging?

4 MS. HALSTEAD: Well, that is one issue with the
5 consultants. Part of what I wanted to say today is they do
6 list about 20 consultants, and all they say is they played the
7 same role as the Commonwealth or the Oversight Board. That's
8 all they say. I don't even know what roles these various
9 consultants did. And to essentially assert a blanket privilege
10 in all the communications, and in some cases there are
11 categories in the log where just the consultants -- there's no
12 officials from the Commonwealth or AAFAF or the Board. And
13 also when we were meeting and conferring regarding the
14 privilege logs, even in the categories where there are people
15 from the Commonwealth listed or the Board listed, if DEFTEC is
16 also listed, there may be communications with DEFTEC, which is
17 one of the consultants, just internal communications.

18 So there probably are a lot of communications like
19 that, and I would submit, Your Honor, that is a really far
20 extension of the deliberative process privilege. The
21 deliberative process privilege is supposed to cover policy
22 decisions of the government. It's not supposed to cover, you
23 know, communications regarding advisors and, you know,
24 discussions about models and what projects and assumptions and
25 inputs to put in. It shouldn't even be covering even drafts of

1 models.

2 Yes, we just had a long time discussing that there's
3 models in the data room, but they were likely exchanging
4 several versions of the model in these communications. I think
5 if you asked them they would say that's clearly covered by the
6 deliberative process privilege. I would say it's clearly not.
7 An Excel sheet with numbers and assumptions and some formulas,
8 that's not what the deliberative process is supposed to cover.
9 In Bhatia, Bhatia found a draft budget, just data and numbers.
10 And both the Supreme Court of Puerto Rico and then the superior
11 court addressing that specific document found that that was not
12 covered by the deliberative process privilege.

13 THE COURT: But "draft," I think there, was used in a
14 different way than creating the document that was being
15 submitted. I mean, I think the court used "draft" there as it
16 hadn't been adopted by the Oversight Board, but it was the
17 final version of what went to the Oversight Board.

18 MS. HALSTEAD: Yeah, but I think that -- it's true
19 that that's a document they were looking at. But why is the
20 last version -- that's the version that's not protected by
21 deliberative process and version 5 is protected. I mean, it
22 just seems like data and numbers and projections and
23 assumptions, this is not the stuff that the deliberative
24 process privilege was intended to protect. And if you look at
25 their privilege log, it looks to me they're withholding a lot

1 of documents on this basis, a lot. And we really question how
2 they're not properly withholding these documents based on
3 Bhatia.

4 THE COURT: So how -- do you have a suggestion as to
5 the most efficient way to present that to the court?

6 MS. HALSTEAD: Well, we thought our suggestion was
7 that the court would address these threshold legal issues, and
8 we thought that that would provide guidance going forward. It
9 seems to me from Your Honor's questions that you think that you
10 may need some more context from going beyond the legal issues,
11 perhaps additional briefing -- if any co-counsel want to speak
12 up -- perhaps additional briefing with us discussing the
13 various categories of documents. Perhaps that might put some
14 context on these legal issues.

15 Again, I will say, though, we do have concerns with
16 the logs, we do. And I just don't understand how they were
17 able to come up with these logs without reviewing any
18 documents. That just sort of boggles our minds, that they've
19 really -- they could very well be withholding documents that
20 are not privileged at all, but they don't know because they
21 haven't looked.

22 THE COURT: Let's address how the log was made first.
23 I think this is going to have to unfortunately take a multistep
24 process.

25 MS. McKEEN: Your Honor, Liz McKeen for AAFAF. I

1 think Your Honor is kind of keying in on what we think some of
2 the key issues are and how we think it makes sense to move
3 forward here.

4 With respect to the log itself, the movants actually
5 referenced these apparently 12 categories that they take issue
6 with in a meet-and-confer call with us on May 10 that we
7 conducted in preparation to file the joint report with the
8 court. And we said to them, Okay, will you tell us what the 12
9 categories are so we can talk about it? And it's now almost --
10 you know, it's over ten days later, and we're still waiting for
11 them to even identify those 12 categories.

12 I don't think the idea of an in camera review makes
13 any sense, precisely because part of the point of the
14 categorical log is to avoid the burden of having to go collect
15 every single document in a particular category, which we have
16 not done and which we specifically advised the movants that we
17 had not done in our transmittal letter that we sent back on, I
18 believe it was April 6.

19 THE COURT: But how did you do the log?

20 MS. McKEEN: How we did the log, I'm glad you asked.
21 They characterized it as it's a hypothetical process that we
22 sat around thinking of communications that occurred. Nothing
23 could be farther from the truth. There were detailed
24 conversations -- and I want to be careful about work product
25 issues and waiver issues. But there were detailed

1 conversations that occurred between and among AAFAF, its
2 lawyers, its financial advisors and all of the various
3 custodians that are listed on this log to identify, Okay, who
4 did you talk to about particular issues. We see these
5 categories of work streams relating to buckets in the fiscal
6 plan. Who was involved in those conversations? Were they just
7 internal, or did they involve external people? Was it just,
8 for example, within DEFTEC, or was it between and among DEFTEC,
9 AAFAF and other advisors?

10 So there were very granular conversations. This is
11 not a hypothetical exercise. It was not a document-by-document
12 exercise, but it was highly fact-intensive and involved
13 hundreds of hours of attorney time and I think produced what
14 was lodged with the court, which is a very detailed document.
15 And I think that document should be the touchstone of how we
16 move forward. I think they need to look at specific
17 categories. And for example, if there's a category where they
18 think the privilege isn't properly being asserted because it
19 includes the Board and they think that's just legally not
20 appropriate, we should be talking about that category. And if
21 there are other categories where they think we haven't given
22 them enough information to substantiate the claim of privilege,
23 an in camera review I think is a wrong tool to solve that
24 problem.

25 I think the appropriate tool to solve that problem

1 would be for us to provide declarations that would substantiate
2 why the privilege is being claimed with respect to that
3 category of information. Here is what these advisors were
4 doing. Here is what they were talking about. Here is why that
5 was important to the process of developing the fiscal plan and
6 why, under the case law, that means the deliberative process
7 privilege should apply to these conversations. And I think
8 that specificity would allow you to make a ruling.

9 But right now we're in this vacuum, where we've done
10 all this work and created the log. They've said they have
11 issues and won't tell us what they are, and they've agreed to a
12 protocol where they were supposed to give us objections within
13 seven days and they're silent for over a month.

14 So I think the ball is kind of in their court to
15 respond with some specificity to our log, and I think that's
16 the right way to move forward here.

17 MR. MASHBERG: Again, Your Honor, Gregg Mashberg on
18 behalf of the Oversight Board. Very briefly, on behalf of the
19 Oversight Board, we conducted a very similar process with our
20 clients, with our colleagues and with our financial advisors in
21 order to come up with a categorical log that we presented and
22 is actually being updated again today pursuant to agreement.

23 There was a very significant back and forth on a daily
24 basis. There were times when our advisors actually had a
25 document in front of them when they were explaining to us and

1 answering our questions regarding the establishment of these
2 categories and whose communications would fit within those
3 categories. So I can tell you, as Ms. McKeen has just done,
4 that there was a very extensive process we went through. We
5 did not go document by document. We never thought that we had
6 to do that or that that made sense in the context of what we
7 were doing, including within the language of Your Honor's
8 February 26 order in terms of what we understood the
9 categorical log to be.

10 To go document by document, if that's what movants are
11 requesting, would cast this into an entirely different domain
12 and it would cost an absolute fortune, and it would take a
13 great, great deal of time and resources. And I certainly
14 didn't read Your Honor's prior order to require that, nor do I
15 hope that Your Honor will order that at this point.

16 THE COURT: No. I agree that document by document is
17 not what I ordered and I am not ordering it. But I want to
18 make sure -- I think that it's fair to have a question as to
19 whether you've covered all of the categories of documents, and
20 if they don't fit within this category, are the documents being
21 produced. And I'm not sure how you do that without having
22 actually put your hands on a group of documents.

23 MR. MASHBERG: Well, the client and the advisors did
24 have documents and their notes in front of them. They didn't
25 go through all the documents, that's for sure, but they

1 understood and they discussed what it was that they were --
2 what documents that they did exchange with each other and with
3 their clients. So this wasn't just done sitting around in a
4 room. I mean, this was done with people looking at their
5 computers, looking at their notes, looking at their documents.

6 MS. McKEEN: Just on behalf of AAFAF, with respect to
7 the same question because we did create our logs separately on
8 behalf of each of our own clients, because we were engaged in
9 this categorical process, rather than the process being about,
10 okay, let's look at individual documents and make sure we've
11 gotten them all, the process was focused on the categories of
12 activity that had been and the tasks that had been performed by
13 each of the relevant entities in terms of the creation of the
14 fiscal plan. When we're talking about these deliberations that
15 are the very reason we're invoking the privilege and these
16 conversations with interim drafts and development of these
17 models, part of the touchstone of the analysis was what were
18 you doing, why were you doing it, who were you doing it with,
19 who did you talk to about it, and what documents would you have
20 exchanged as part of that process.

21 And so the effort was to be as comprehensive as
22 possible, precisely to make sure there weren't categories of
23 documents or things we were missing. Of course we don't want
24 there to be an argument that we waived something because we
25 missed it. Every effort was made to be as comprehensive as

1 possible as part of this process.

2 MS. HALSTEAD: Just to address a few things they said,
3 then I have a suggestion of perhaps a way to resolve this
4 without discussing with the other counsel.

5 But one thing is, if you look at their cover letters,
6 they do not disclose this. We learned how they put these logs
7 together for the first time on May 10. We also aren't trying
8 to hide objections we have with the logs. We didn't talk to
9 them -- after we raised the 12 categories, on the same call we
10 learned how they prepared their logs. And quite frankly, that
11 really threw us for a loop, and we realized we had to go back
12 to the basics, that we had some real issues with how they put
13 the logs together, and it really didn't make sense for us to
14 identify 12 categories where we had some far more basic
15 concerns about the logs. That's why we didn't do it.

16 We do -- just to be clear, we do have other objections
17 with the logs. We weren't trying to delay or anything like
18 that. It's just that these deliberative process privilege
19 issues were being briefed. We put in the papers that we've
20 reserved all of our objections regarding the logs. And quite
21 frankly, Your Honor, every single entry in the log has a claim
22 of deliberative process privilege, every single one.

23 THE COURT: Well, I think that was the point of the
24 log.

25 MS. HALSTEAD: Right, yeah. But other objections, for

1 instance, they assert common interest privilege between the
2 Board and the Commonwealth. You know, I think there are some
3 questions whether the common interest privilege exists when
4 they're having disputes regarding the fiscal plans. So there
5 are other issues we have with the logs. We also have issues
6 with the descriptions. A lot of them are very general.

7 But putting all that aside, I think, you know, they're
8 saying there's this massive burden for them to, you know,
9 review documents and that sort of thing. I think we could come
10 to an agreement for them to search specific custodians for a
11 certain date range with certain search terms and we could come
12 up with a narrow universe, and then that universe could
13 either -- could be submitted to Your Honor for in camera
14 review. I think that's the way to go about it. And again, you
15 know, they have produced emails in other cases in the
16 Commonwealth/COFINA adversary, they produced 40,000 documents.
17 I mean, it's not unusual.

18 THE COURT: The question is whether I'm doing that in
19 in camera review.

20 MS. HALSTEAD: I'm not suggesting that at all, Your
21 Honor, but I'm suggesting a more limited subset that I think we
22 could come up with something, some limited universe for an in
23 camera review.

24 THE COURT: Let's try that second, all right? And
25 mostly because I have found that even in cases that are much

1 more finite, an in camera review by the court that doesn't
2 really know all the players and all the intricacies makes it
3 difficult to come up with a fair ruling. So I'm not ducking
4 the work. I'm just not sure it's the most efficient use of
5 everybody's time. But I do think the burden is on the party
6 claiming the privilege, and they have to justify it.

7 MS. HALSTEAD: Yes.

8 THE COURT: And I do think that the idea of an
9 affidavit or declaration by someone with knowledge makes sense.
10 I do think linking it to the privilege log at least to start
11 makes sense. Maybe this is where you start with categories.
12 Do you say, Look, we're not buying all of these consultants, or
13 we don't know, we don't know, and if you're going to claim
14 privilege on -- and you don't need to give them every single
15 document in here, but you can give them categories and say, I'm
16 having a real hard time figuring out how these people can all
17 be privileged; you need to prove it to me. Or you can say to
18 them, Look, on this date, you submitted a draft to the
19 Oversight Board. After that date, you know, I don't see how
20 you claim a privilege. I mean, is 12 really a number, or is
21 everybody just --

22 MS. HALSTEAD: That was -- we just -- again, it was
23 supposed to be, intended to be a sample of categories that we
24 saw as problematic as we saw that didn't appear to have a real
25 basis, but it was just supposed to be a kind of a sampling. It

1 wasn't supposed to be all of our objections, absolutely not.
2 It was sort of to try to narrow the universe to try to agree on
3 something to submit for an in camera review when we suggested
4 that.

5 THE COURT: So instead of doing that as in camera
6 review as the next step -- and maybe it's not 12, maybe we try
7 it with five and see how that works -- but that you submit
8 those objections, those categories to whichever entity is
9 claiming the privilege, have them have the burden of arguing
10 why they think it is privileged. And then if that's not
11 persuasive to you, then it comes to me in a context that I can
12 look at.

13 I'm happy to do it sooner rather than later, but I
14 think I need to at least give it a shot to see if that kind of
15 process will work here. I don't have a whole lot of creative
16 ideas at the moment. If I sit here long enough, God knows what
17 I'll come up with, but I think something like that.

18 MS. HALSTEAD: Are you envisioning, Your Honor, like
19 we would do this in letters first and then if we were unable to
20 resolve the disputes, then we would bring them before Your
21 Honor?

22 THE COURT: Yes. Then I will have a sense of what it
23 looks like. I will have a sense of what they're claiming as
24 the privilege. And I assume it's going -- they have to
25 convince you that it's privileged. And if they haven't, then

1 you should be able to identify what component part -- which of
2 their arguments are you not buying? Are you not buying the
3 factual argument, or you're not buying a legal argument, and
4 that way I can make a ruling. I think something like that
5 would at least give us something more concrete to talk about.
6 I don't want this to drag on for the entire history of PROMESA,
7 but I feel like if there are certain very clear categories that
8 you think will generate that issue of law that you want me to
9 decide, that's a way to crystalize it.

10 MS. HALSTEAD: Yeah. I think one suggestion in order
11 not to drag this on, I think you suggested five categories.
12 Quite frankly, I think we should bring as many objections as we
13 can as part of this. Otherwise, we're just doing it piecemeal,
14 and I'm afraid the process will drag out.

15 THE COURT: I'm okay if you're okay. I think they
16 wrote a book like that. I'm just trying to figure out how to
17 see if the process is working. So why don't I not set the
18 limit. Why don't you see if you can agree on it. But the idea
19 would be that it's without waiver. And what I would like to
20 see is a way to determine whether this type of process where
21 the party claiming the privilege has the burden, if producing
22 those types of declarations are a good way to crystalize the
23 issue that the court needs to decide.

24 If you think doing 12 or however many you want, I'm
25 not intending to limit your claims of objections. I'm trying

1 to develop, if we try it that way and it's not working that way
2 but maybe one deposition will solve the problem.

3 MS. HALSTEAD: I was going to suggest if they're
4 putting in declarations, we may need some way to rebut that
5 testimony, and we're obviously --

6 THE COURT: They need to present -- they need to
7 convince you. I mean, that's the point, right? They're
8 claiming a privilege. You need to look at it and say, I'm
9 either accepting it, it's either persuasive, or I need more
10 information. You can try to work it out. Or we're just not
11 accepting this as true, or we have a legal issue that says you
12 can declare this all you want, we've now got the facts, but we
13 don't agree with you as a matter of law.

14 But you're all quoting me the same cases on what the
15 standards are. We're not fighting on the standards of
16 deliberative process. What we're fighting on is how does that
17 relate to what's actually going on in this case. And I'm just
18 trying to figure out the most efficient way to get to that very
19 concrete ruling. I think the questions that you phrased in the
20 joint status report were too general for me to rule on anything
21 other than saying maybe, sometimes. That doesn't move it
22 forward.

23 So I'm going to let you work on a process that you
24 identify the categories, the parties claiming the privilege
25 need to submit a declaration to you, and you then, if that

1 doesn't work, present it to the court. You can talk about how
2 to present it. If you can't agree on how to present it, file a
3 status report that tells me these are the different options
4 that we're proposing, or we need another hearing, you know, we
5 just need to talk about this. But I think we need to anchor
6 the legal issues into some facts.

7 MS. HALSTEAD: Okay.

8 MR. MUNGOVAN: Your Honor, Timothy Mungovan for the
9 Oversight Board. Could I be heard just briefly?

10 THE COURT: Yes.

11 MR. MUNGOVAN: Thank you. Again, Timothy Mungovan for
12 the Oversight Board, Your Honor. Just briefly, the Oversight
13 Board's privilege log currently has 59 categories, the copy
14 that I have in front of me, that's as of today, so this is an
15 updated version of it. It's not the version that was filed
16 with the court.

17 The Oversight Board is fine in working through a
18 process with the claimholders, and we think you're right, Your
19 Honor, that there seems to be some type of fundamental
20 disagreement between the parties as to what is privileged.
21 What I want to address is what I think is the most efficient
22 path forward to get to a resolution from the court. What I
23 would say is if we leave it to the claimholders to designate X
24 number, 12, 15, 20 of these separate categories, it will create
25 a lot of work potentially and needlessly.

1 What I might suggest is they pick their top five or
2 six, the ones that they think they doubt the most, and we can
3 then be put to the test of establishing the applicability of
4 the privilege that we have asserted. And the process may drive
5 a resolution more efficiently. If the parties have a
6 fundamental disagreement about the interpretation of the
7 relevant case law, which I think we may, once we get a decision
8 from the court, it may resolve the remaining 30, 40, 50
9 some-odd categories, rather than to force the parties to go
10 through the effort of defending a position on an evidentiary
11 basis, if you will, and then have the court decide one or two
12 or three, which ultimately ends up resolving all 30 or 40
13 challenged categories.

14 THE COURT: So where do you think -- let me ask you,
15 do you agree that we need more facts for these legal issues?

16 MR. MUNGOVAN: I do. And I agree with the court that
17 having a process whereby the claimholders identify specific
18 categories that they want to challenge makes sense. I agree
19 that the burden should then shift to the Oversight Board and
20 AAFAF and the instrumentalities to establish the validity of
21 the privilege that they're asserting.

22 What I would like to do, though, Your Honor, is to
23 focus on test cases. Let's have five, let's have six, pick a
24 number of test cases. Rationally the claimholders should pick
25 what they perceive to be the most important categories that

1 they believe we are weakest on, and then let's tee those up and
2 make the respondents be put to the proof of demonstrating the
3 applicability of the privilege. And then if we can't
4 demonstrate it to the movants' satisfaction, then we have a
5 live issue that the court can join and adjudicate. Thank you.

6 THE COURT: So I think it shouldn't be an endless
7 number. It should be somewhere between one and 12. I don't
8 know if you want me to designate a number. I agree that I
9 think we need to do it in a test case just to see if the
10 process works.

11 MS. HALSTEAD: Yes, yeah, yes.

12 THE COURT: Can you live with six?

13 MS. HALSTEAD: We would prefer 12.

14 THE COURT: Why don't I say not to exceed 12, all
15 right?

16 MS. HALSTEAD: Okay.

17 THE COURT: But you need to -- you're not waiving
18 anything.

19 MS. HALSTEAD: Yeah, just so we're clear.

20 THE COURT: You really want to deal with it in a
21 fashion so we can at least see if the process is going to work.

22 MS. HALSTEAD: Yes.

23 THE COURT: I'm not leaving out the ultimate question
24 of whether there should be any claim, but I also don't know how
25 to do that on an abstract basis. So that's sort of in the back

1 scene and you can bring it up where you think it's appropriate.
2 I think it's easier to bring it up in a concrete manner if you
3 want to take a blanket argument that says, Okay, we see
4 everything that they've given us but the bottom line, the
5 balancing comes out to disclosure no matter what, you can argue
6 that.

7 MS. HALSTEAD: Thank you, Your Honor. Can we propose
8 some sort of schedule while we're all here?

9 MS. McKEEN: Before we do that, one thing that might
10 make sense in terms of teeing up, as Mr. Mungovan said, test
11 cases and ways to sort of crystalize the issues. To the extent
12 the court is willing to hear argument and consider the law and
13 facts as to 12 different categories, it might make sense to
14 have the movants select the six categories as to which they
15 feel they're strongest, best exemplify where the privilege
16 shouldn't apply and that we pick six categories as to which we
17 think the case for the privilege is obviously the strongest to
18 help, again, kind of get some test case rulings that will be as
19 broadly applicable to all the remaining categories moving
20 forward. I think that might be the best way to divide up the
21 12 test cases so that you're getting the most illustrative
22 cross-section of what's in the logs.

23 MS. HALSTEAD: I object to that. I mean, every
24 document they're withholding should be privileged. That's
25 their burden. Like, we're just trying to contest what we're

1 seeing as not privileged documents. For them to say, to show
2 their best cases, I don't see where that gets us anywhere.
3 Because quite frankly, all the documents -- they should all
4 have a basis for withholding documents as privileged.

5 THE COURT: I think I'd like to leave that to the
6 second round. I think maybe once we've come up with these sort
7 of parameters on some concrete documents there may be
8 categories that easily get knocked out, which I think is what
9 you're saying, right? There are categories that you feel are
10 so obviously privileged that you shouldn't have to do anything.

11 MS. McKEEN: That's right, Your Honor. There are some
12 categories that are so core that I think your consideration of
13 both the law and maybe a declaration around that category would
14 not only tend to knock out that category but might give a
15 useful framework for other categories as well.

16 THE COURT: I'm going to have the movants be able to
17 designate up to 12. If you think I'm missing something, when
18 you see those categories, if you think that there are other
19 issues that really need to be decided first or whatever, I
20 mean, you need to start this conversation somewhere, right? So
21 if the movants start with the 12, you take a look at it. If
22 you think this is missing something, if you think this is
23 really not a smart way to do it, just file a motion. Come
24 back, we'll talk about it, we'll figure it out. But I think we
25 need to do this in a test-case scenario. I ask you also to

1 think about whether you need all 12.

2 MS. HALSTEAD: Yes, Your Honor.

3 THE COURT: Because if you do 12, they're going to
4 spend time coming up with the declarations, and it's going to
5 be delayed.

6 MS. HALSTEAD: Yes.

7 THE COURT: All right. So it's going to be up to 12
8 categories. See if it works. If you don't think it's working,
9 just ask for a conference and we'll come back in and we'll
10 figure out why it's not working. All right? But I think those
11 were good suggestions of ways to deal with at least getting to
12 crystallize what the issues are that you need me to decide, and
13 I can't do it without some factual basis, okay? And I don't
14 speak Spanish, so if the documents are all going to have to be
15 translated, we have another issue. All right?

16 MS. HALSTEAD: I assume we can work out a schedule.

17 THE COURT: Do you want to do that now? Do you want
18 to take a minute?

19 MS. McKEEN: I think it would be best if we met and
20 conferred and maybe file something with the court.

21 THE COURT: You need to report to me within a week
22 what your schedule is going to be. How is that?

23 MS. HALSTEAD: Thank you. That works. Thank you.

24 THE COURT: Should I ask my favorite, is there
25 anything else, or should I just excuse you all? All right.

1 There's nothing else. I don't see anybody jumping up and down.
2 Thank you, all.

3 COURTROOM CLERK: Court is in recess.
4 (Adjourned, 3:56 p.m.)

5

6 CERTIFICATE OF OFFICIAL REPORTER

7 I, Kelly Mortellite, Registered Merit Reporter and
8 Certified Realtime Reporter, in and for the United States
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13 above-entitled matter and that the transcript page format is in
14 conformance with the regulations of the Judicial Conference of
15 the United States.

16 Dated this 24th day of May, 2018.

17

18 /s/ Kelly Mortellite

19

20 Kelly Mortellite, RMR, CRR
21 Official Court Reporter

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25